Malayan Banking Bhd v Chuah Chok Kiang

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 24-849 OF 1992
LOW HOP BING J
21 JANUARY 1997

Land Law *— Restraints on dealings — Caveats — Application for removal of caveat — Whether caveator had caveatable interest in land — Whether caveator was an aggrieved person — National Land Code 1965 ss 323(1)(a) & 327(1)*

On 26 March 1984, the plaintiff entered into a loan agreement cum assignment ('the loan agreement') with one Chuah Eng Khong ('Chuah'), and granted Chuah a housing loan of RM60,000 to purchase a parcel of land with a building erected thereon ('the land') from Sri Donglai Sdn Bhd ('the developer'). At that time, the document of title had not been issued. The loan agreement stated that Chuah had expressly assigned unto the plaintiff all his rights, title and interest in the land and that upon issuance of the title, Chuah shall execute a charge over the land in favour of the plaintiff. The title was issued on 19 November 1984. On 3 June 1985, Chuah sold the land to one Tan Ah Tong ('Tan'), the defendant's husband, for the sum of RM160,000 ('the sale'). Tan, in turn, by a novation cum assignment ('the assignment'), purportedly assigned the land to the defendant without any monetary consideration. Both Tan and the defendant separately caveated the land. As a result of the caveats, the plaintiff was unable to effect transfer of the charge on the land. The private caveat entered by Tan subsequently lapsed. The plaintiff applied to remove the defendant's caveat. The issues before the court were whether: (i) the plaintiff was an aggrieved person entitled to apply for the removal of the defendant's caveat; and (ii) the defendant had the right to enter his caveat.

Held, allowing the application:

(1) It was for the plaintiff, who was not a registered proprietor but an assignee, to prove that it was an 'aggrieved body' under s 327(1) of the National Land Code 1965 ('the Code'). A 'person or body aggrieved' under s 327(1) has been decided as someone who has been wrongfully deprived of his title to the property, or any person whose rights in the caveated land would be affected and would suffer loss if that caveat is not removed. The plaintiff was being deprived of the rights and legal protection provided by the Code to a legal chargee. As long as the caveat was not removed, the plaintiff would remain as an unregistered chargee. Therefore, the plaintiff was clearly an aggrieved body (see p 783A–G); *Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors* [1994] 1 MLJ 136; *RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors* [1980] 1 MLJ 248 and *Wu Shu Chen & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 followed.

(2) Under the loan agreement between Chuah and the plaintiff, Chuah had already expressly assigned unto the plaintiff all his rights, title and interest in the land and therefore, he was in no position to sell the land. Applying the maxim of nemo dat qui non habet, the subsequent buyer, Tan, could not acquire any rights, title or interest in the land which in turn was incapable of assigning any rights in the land to the defendant. In these circumstances, the defendant had not brought himself within s 323(1)(a) of the Code and therefore had no caveatable interest. The plaintiff's application for the caveat to be removed was allowed with costs (see p 785B–C); *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 and *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79 followed.

[Bahasa Malaysia summary

Pada 26 Mac 1984, plaintif telah mengikat suatu perjanjian pinjaman serta penyerahan hak ('perjanjian tersebut') dengan seorang Chuah Eng Kong ('Chuah'), dan telah memberi Chuah satu pinjaman perumahan sebanyak RM60,000 untuk membeli sebidang tanah dan bangunan yang dibina diatasnya ('tanah tersebut') daripada Sri Donglai Sdn Bhd ('pemaju tersebut'). Pada masa itu, dokumen hakmilik belum dikeluarkan. Perjanjian tersebut menyatakan bahawa Chuah dengan jelasnya telah menyerahkan semua hak-hak, hakmilik dan kepentingan dalam tanah tersebut kepada plaintif. Apabila hakmilik dikeluarkan, perjanjian tersebut menyatakan bahawa Chuah akan melaksanakan gadaian tanah tersebut kepada plaintif. Hakmilik telah dikeluarkan pada 19 November 1984. Pada 3 Jun 1985, Chuah telah menjual tanah tersebut kepada seorang Tan Ah Tong ('Tan'), suami defendan, untuk jumlah sebanyak RM160,000 ('jualan tersebut'). Selepas itu, Tan, dengan suatu novasi serta penyerahan hakmilik bertarikh 3 Jun 1986 ('penyerahan hakmilik tersebut'), telah menyerahkan hak tanah tersebut kepada defendan tanpa sebarang balasan kewangan. Pada 8 April 1986 dan 13 Mac 1992, dua kaveat persendirian telah dimasukkan ke atas tanah tersebut oleh Tan dan defendan masing-masing. Akibat daripada kaveat-kaveat itu, plaintif tidak dapat melaksanakan pemindahan milik gadaian tanah tersebut. Kaveat persendirian yang dimasukkan oleh Tan kemudiannya telah berakhir dan plaintif telah memulakan saman pemula ini untuk menyingkirkan kaveat defendan. Hakmilik tanah tersebut ada penyekatan kepentingan yang menyatakan bahawa ia tidak boleh dijual, dicagar, digadai atau dipindah milik dalam sebarang cara tanpa kebenaran Pihak Berkuasa Negeri ('penyekatan tersebut'). Tiada kebenaran diperolehi oleh Tan untuk jualan tersebut dan oleh defendan untuk penyerahan hakmilik tersebut. Dua isu telah dihadapkan ke mahkamah. Pertamanya, sama ada plaintif adalah seorang yang terkilan yang berhak untuk memohon penyingkiran kaveat defendan dan keduanya, sama ada defendan berhak untuk memasukkan kaveatnya.

Diputuskan, membenarkan permohonan:

(1) Adalah tanggungjawab plaintif, bukan sebagai seorang pemilik berdaftar tetapi seorang yang dipindah hak, untuk membuktikan bahawa ia adalah 'pertubuhan terkilan' di bawah s 327(1) Kanun Tanah Negara 1965 ('Kanun tersebut'). Sesuatu 'orang atau pertubuhan terkilan' di bawah s 327(1) telah diputuskan sebagai seorang yang dengan salahnya tidak mendapat hakmilik ke atas hartanya, atau seorang yang haknya ke atas tanah berkaveat akan terjejas dan menyebabkannya mengalami kerugian jika kaveat tersebut tidak disingkirkan. Plaintif tidak mendapat hak-hak dan perlindungan undang-undang yang diberi oleh Kanun tersebut kepada seorang pemegang gadaian yang sah. Selagi kaveat itu tidak disingkirkan, plaintif akan tetap seorang pemegang gadaian yang tidak berdaftar. Oleh itu, plaintif dengan jelasnya adalah sebuah pertubuhan terkilan (lihat ms 783A–G); *Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors* [1994] 1 MLJ 136; *RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors* [1980] 1 MLJ 248 dan *Wu Shu Chen & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 diikut.

(2) Di bawah perjanjian pinjaman dan penyerahan di antara Chuah dengan plaintif, Chuah dengan jelasnya telah menyerahkan semua hak-hak, hakmilik dan kepentingan tanah tersebut kepada plaintif dan tidak di dalam kedudukan untuk menjual tanah tersebut. Dengan memakai pepatah nemo dat qui non habet, pembeli seterusnya, Tan, tidak dapat memperolehi sebarang hak, hakmilik atau kepentingan ke atas tanah tersebut dan tanah tersebut tidak boleh diserahhak kepada defendan. Dalam keadaan ini, defendan tidak diliputi oleh s 323(1)(a) Kanun tersebut dan oleh kerana itu tidak mempunyai kepentingan yang boleh dikaveat. Permohonan plaintif supaya kaveat tersebut disingkirkan dibenarkan dengan kos (lihat ms 785B–C); *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 dan *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79 diikut.]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419.

Cases referred to

Cahya Makmur Holdings (Melaka) Sdn Bhd v Heap Huat Rubber Co Sdn Bhd & Anor [1992] 1 MLJ 201 (refd)

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212 (refd)

Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud [1976] 2 MLJ 79 (refd)

Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (refd)

Murugappa Chettiar Lakshmanan & 3 Ors v Lee Teck Mook [1995] 1 AMR 958 (refd)

Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors [1994] 1 MLJ 136 (folld)
RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors [1980] 1 MLJ 248 (folld)
Wu Shu Chen & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487 (folld)

Legislation referred to

National Land Code 1965 ss 323(1)(a), 327(1), 340(3)

Chin Ling Hau (*Ho Loke & Koh*) for the plaintiff.
Ngeow Yin Ngee (*Mohd Daud & Ngeow*) for the defendant.

Cur Adv Vult

Low Hop Bing J:

Application

This is the plaintiff's application by way of originating summons in encl (1) for the removal of the caveat entered by the defendant ('defendant's caveat') on 13 March 1992.

Facts

The facts of the case are as follows. By a loan agreement cum assignment dated 26 March 1984 ('the LACA'), the plaintiff had granted to one Chuah Eng Khong ('Chuah') a housing loan of RM60,000 to purchase all that parcel of land held under HS (M) 14801, PT 5533, Lot 023815, Mukim Ampang, together with a building erected thereon ('the land') from Sri Donglai Sdn Bhd ('the developer'). There was then no issue of the document of title ('the title') to the land.

Under cl 5 of the LACA, Chuah has, inter alia, expressly assigned unto the plaintiff all his rights, title and interest in the land. Clause 12 of the LACA provides that upon issuance of the title, Chuah shall execute a charge over the land in favour of the plaintiff.

The title was issued on 19 November 1984.

Without the plaintiff's knowledge and the developer's consent, Chuah, by a sale and purchase agreement dated 3 June 1985, purportedly sold the land to one Tan Ah Tong ('Tan'), who is the defendant's husband, for the sum of RM160,000 ('the sale'). Tan, in turn, by a novation cum assignment dated 3 June 1986 ('the assignment'), purportedly assigned the same to the defendant without any monetary consideration.

Two private caveats ('the caveats') dated 8 April 1986 and 13 March 1992 had been entered by Tan and the defendant respectively against the land.

As a result of the caveats, the plaintiff was unable to effect transfer of the charge on the land. The private caveat dated 8 April 1986 entered

by Tan had subsequently lapsed. The plaintiff has now commenced this originating summons to remove the defendant's caveat. A

The solicitors acting for Chuah, Tan and the defendant and who were in charge of the preparation of the LACA, the sale and the assignment as well as the entries of the caveats were, at all times, Messrs Lian & Co.

From the date of issuance, the title is registered in the developer's name and hence it has to be transferred to Chuah to subsequently enable the plaintiff to register the charge as security for the loan granted by the plaintiff to Chuah. B

The title has a restriction in interest that it cannot be sold, pledged, charged or transferred in any manner without the approval of the State Authority ('the restriction'). Approval of the State Authority had been duly obtained by the developer in respect of the transfer of the land to Chuah and the charge of the same to the plaintiff. However, no approval had been obtained by Tan for the sale and by the defendant for the assignment. C

By action vide Kuala Lumpur High Court Suit No S6–22–684–1993 ('the suit'), the defendant and Tan sought, against Chuah, specific performance of the sale and of the assignment. However, the same was only filed on 19 August 1993. No further steps had been taken by the defendant and Tan in the suit at least until 13 August 1996, ie the date the affidavit of Chai Su Boon [encl (13)] was affirmed. Even until today, there is no evidence of any further steps taken by Tan or the defendant in the suit. D E

Issues for court's determination

Is the plaintiff an aggrieved person and therefore entitled to apply to remove the defendant's caveat?

Does the defendant have the right to enter her caveat? F

Aggrieved person or body

Section 327(1) of the National Land Code 1965 ('the Code') enables an aggrieved person or body to apply to the court for the removal of a private caveat and reads as follows: G

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court ... may make such order on the application as it may think just.

Person who may enter a private caveat H

Section 323(1)(a) of the Code provides for the person who may enter a private caveat and reads as follows:

> The person and bodies at whose instance a private caveat may be entered are —
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest; I

A *Plaintiff's legal position*

As the plaintiff in this case is not a registered proprietor but an assignee, it is for the plaintiff to first prove that it is an 'aggrieved body' under s 327(1). Once this is established, the onus shifts to the defendant caveator to satisfy the court that there are sufficient grounds in fact and law for the B caveat to continue in force: see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212; *Malaysian Court Forms in Civil Proceedings*, Malayan Law Journal Sdn Bhd (Issue 2, 1996) and *Cahya Makmur Holdings (Melaka) Sdn Bhd v Heap Huat Rubber Co Sdn Bhd & Anor* [1992] 1 MLJ 201.

A 'person aggrieved' under s 327(1) has been decided by our courts C as someone who has suffered a legal grievance; a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something or that in law something wrongful has been done to him that affects his title to the property: see *Punca Klasik Sdn Bhd v Abdul Aziz bin Abdul Hamid & Ors* [1994] 1 MLJ 136, or any person whose D legitimate rights or interests in the caveated land would be affected or who would suffer loss if the caveat in question is not removed: see *RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors* [1980] 1 MLJ 248. More recently, Mokhtar Sidin JCA, in *Wu Shu Chen & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487 at p 499 said that: 'an aggrieved E person is ... a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed'.

The plaintiff in the instant case has entered into the LACA with Chuah, with the intention that a legal charge be created on the land to secure the plaintiff's interest when the title is issued. However, Chuah had F wrongfully sold the land to Tan who in turn had wrongfully assigned the same to the defendant. The plaintiff is prevented from presenting the charge, as the defendant had entered the defendant's caveat, albeit wrongfully. The plaintiff has also suffered legal grievance since he is being deprived of the rights and legal protection provided by the Code to a legal G chargee. As long as the defendant's caveat is not removed, the plaintiff will remain as an unregistered chargee. Therefore, the plaintiff is clearly an aggrieved body.

Having established that the plaintiff is a body aggrieved by the existence of the defendant's caveat, the onus now shifts to the defendant H to satisfy the court that there are sufficient grounds in fact and in law for the defendant's caveat to continue in force. This resolves into the question as to whether the defendant has a caveatable interest under s 323(1)(a) of the Code: see *Murugappa Chettiar Lakshmanan & Ors v Lee Teck Mook* [1995] 1 AMR 958.

I *Nemo dat qui non habet*

Chuah has by the LACA assigned all his rights, title and interest in the land to the plaintiff. In the premises, I am of the view that Chuah is not in

a position to execute the sale and purchase agreement in favour of Tan. Tan, in turn, is in no position to execute an assignment in favour of the defendant. This is an illustration of the maxim nemo dat qui non habet, ie a person cannot give what he does not have. This maxim was applied by the Federal Court in *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116. In that case, the execution creditor's prohibitory order against the land registered in the name of the judgment debtor was set aside on the ground that the judgment debtor had, prior to the execution proceeding, already sold the land to a purchaser and had divested himself of his entire interest in the land to the same. There was nothing left that could be sold by the said judgment debtor.

In *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79, the vendor, a Malay, sold a piece of Malay Reservation land to a Siamese purchaser ('the first purchaser') who had later sold the said land to a non-Malay ('the second purchaser') in contravention of s 6 of the Kedah Malay Reservation Enactment (En No 63) which made void any transfer of the title, right or interest in respect of such land to a non-Malay. The Federal Court, in applying the maxim, held that the sale of the land from the vendor to the Siamese purchaser was void ab initio. As the first purchaser did not have a good title, the same could not pass a good title to the second purchaser.

It has been argued for the defendant that the defendant is a bona fide purchaser for value without notice thereby defeating the plaintiff's interest. This argument had also been advanced in *Haji Hamid*'s case, but was rejected by the Federal Court.

The proviso to s 340(3) of the Code may be a modification to the general application of the maxim. However, in order to invoke s 340(3), the following conditions must all be satisfied:

(a) The purchaser must be a purchaser in good faith and for valuable consideration.

(b) The purchaser must have acquired some title or interest in the land.

As there was nothing left that Chuah could sell to Tan in the first place, Tan therefore could not have a good title that he could pass on to the defendant. This condition is therefore not fulfilled.

(c) The title or interest acquired by the purchaser (if any), must have been registered under the Code.

There is no title or interest that had been registered under the Code.

From the above analysis, it is clear that the maxim applies in this case and the defendant does not have any caveatable interest in the land.

Peh Swee Chin FCJ, in delivering the judgment of the Federal Court, gave a clear exposition on the applicability of the maxim in respect of personal property, otherwise known as personalty or movable property, such as money, goods, stocks and shares and chose in action in the case of *Public Finance Bhd v Scotch Leasing Sdn Bhd (In receivership) (Perwira Habib Bank Malaysia, Intervener)* [1996] 2 MLJ 369, which in my opinion,

applies with equal vigour to real property (otherwise known as realty or immovable property such as land).

Conclusion

In my judgment, Chuah upon assigning all his rights, title and interest in the land to the plaintiff, has already divested himself of any rights, title and interest in the land and is in no position whatsoever to sell his land: nemo dat qui non habet. Hence, Tan can acquire no rights, title or interest in the land which in turn is incapable of being assigned to the defendant. In the circumstances, the defendant has not brought himself within the ambit of s 323(1)(a) of the Code and therefore the defendant has no caveatable interest. I allow the plaintiff's application with costs and hereby order that the caveat be removed forthwith.

Application allowed.

Reported by David Lai Chung Yew